UNITED STATES
v.
BILLY JOE BAGWELL AND CYNTHIA GOURLEY BAGWELL

IBLA 91-105 Decided April 24, 1998

Appeal from a Decision of Chief Administrative Law Judge Parlen L. McKenna declaring three lode mining claims invalid for the lack of a discovery of a valuable mineral deposit and failure to hold the claims in good faith for mining purposes, and declaring a millsite claim invalid because it was not being used or occupied in good faith for mining or milling purposes. Contest No. CACA 25303.

Affirmed.

1. Administrative Authority: Generally--Mill sites: Determination of Validity--Mining Claims: Contests--Mining Claims: Litigation--Mining Claims: Millsites--Res Judicata

When, at the time an administrative law judge renders a decision on the validity of a millsite claim, a Federal district court has already ruled that the claim is invalid because it is not being used or occupied in good faith for mining or milling purposes, as required by section 15 of the Mining Law of 1872, as amended, 30 U.S.C. § 42 (1994), the judge properly declares the claim invalid in accordance with the court's decision. Neither the judge nor this Board may adjudicate whether the court had the requisite jurisdiction to issue its ruling.

2. Mining Claims: Contests--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally--Mining Claims: Discovery: Marketability--Mining Claims: Marketability

The Board will affirm a decision by an administrative law judge declaring lode mining claims invalid because the claimants failed to overcome the Government's prima facie case that the claims were not supported by the discovery of a valuable mineral deposit, within the

boundaries of each claim, where they failed to demonstrate, by a preponderance of the evidence, that minerals were disclosed, either on the surface or in old underground workings, in such quality and quantity that they could be extracted, removed, and marketed at a profit.

APPEARANCES: Billy Joe Bagwell and Cynthia Gourley Bagwell, pro sese; Jack Gipsman, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Billy Joe and Cynthia Gourley Bagwell have appealed from a November 8, 1990, Decision of Chief Administrative Law Judge Parlen L. McKenna, declaring the Dora May, Little Ruth, and Thelma May lode mining claims, CAMC-21381 through CAMC-21383, invalid for the lack of a discovery of a valuable mineral deposit and failure to hold the claims in good faith for mining purposes, and declaring the Dora May millsite claim, CAMC-25879, invalid because it was not being used or occupied in good faith for mining or milling purposes.

The subject mining and millsite claims encompass approximately 65 acres of land situated in sec. 13, T. 3 N., R. 12 W., San Bernardino Meridian, Los Angeles County, California, on and around Iron Mountain, within the Angeles National Forest, which is administered by the United States Forest Service (USFS), U.S. Department of Agriculture. The claims were originally located in 1934 (Dora May and Little Ruth mining claims), 1935 (Dora May millsite), and 1944 (Thelma May), and ownership has devolved, by various means, such that they are currently owned by the Bagwells (mining claims) and by Mr. Bagwell (millsite claim). The Bagwells' interest in the claims dates from 1973.

The Dora May mining claim has received the greatest amount of mining development, much of which is historical. Prior to 1900, the area now encompassed by that claim was the site of the "Black Cargo Mine," a small underground gold mine. The mine is reported to have primarily consisted of four adits that were driven at various levels along the side of the mountain, followed southeast-trending veins for a total distance of about 700 feet, and were connected by two 45-foot-deep shafts. Mineral ore was carried down the steep slopes of the mountain by a 2,000-foot-long cable tramway to what is now the site of the Dora May millsite claim and processed. It is not known what amount of ore was removed from the mine or what gold and other minerals was recovered from the ore. At some point in time, the mine ceased operation. See generally Ex. C-45, at 18. 1/

1/ Exhibit C-45, like other exhibits in the record, is a separately-paginated document. In citing to such an exhibit, we will cite to the page number of the document.

In 1952, the owners of the subject claims did not reactivate any of the underground workings, but instead removed and processed most of the old mill tailings, presumably attempting to extract any remaining gold or other minerals. (Ex. C-45, at 18.)

Since about 1973, the Bagwells have resided on the millsite claim, which borders Monte Cristo Creek in a one-story frame house, which has electricity and running water. The claim is also the situs of a water tank, trailer, sheds, livestock pens, a vegetable garden, and an outhouse. There is also a small mill, composed largely of salvaged parts, which is capable of processing 1 ton of ore each day, and assorted mining and milling equipment.

On April 30, 1990, prior to the issuance of Judge McKenna's November 1990 Decision, U.S. District Judge Stephen V. Wilson issued a Memorandum of Decision and Judgment in United States v. Bagwell, No. CV 88-4944 SVW (C.D. Cal.). That lawsuit was based on a complaint brought on behalf of the USFS against the Bagwells for trespass damages and ejectment in connection with their use and occupancy of the Dora May millsite claim. 2/ The district court decision found that the Bagwells were not using or occupying the claim in good faith for mining or milling purposes, as required by section 15 of the Mining Law of 1872, as amended, 30 U.S.C. § 42 (1994), as either a dependent or an independent millsite, and concluded that the millsite was invalid and that the Bagwells were in trespass. Thus, the Bagwells were ordered to vacate the millsite and restore it to its natural state within 30 days, as well as to pay the United States damages for the past trespass.

The Memorandum of Decision and Judgment which was issued after Judge McKenna's November 1990 Decision, was affirmed by the United States Court of Appeals for the Ninth Circuit on April 21, 1992, in United States v. Bagwell, 961 F.2d 1450. The circuit court specifically held that the district court had "correctly determined that [the] Bagwell[s'] mill site claim is invalid." 961 F.2d at 1456. The Bagwells did not petition the U.S. Supreme Court for a writ of certiorari.

On September 15, 1989, the Bureau of Land Management (BLM), on behalf of the USFS, issued a Contest Complaint to the Bagwells, charging that the subject mining and millsite claims are invalid because

> (1) There are not presently disclosed within the boundaries of the lode mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute the discovery of a valuable mineral deposit;

2/ The complaint was initiated after the Bagwells failed to vacate and remove structures from the millsite following final revocation by the USFS of their approved plan of operations as to the four claims on May 3, 1987, and a May 27, 1987, notice from the USFS to do so.

(2) The land embraced within the lode mining claims is nonmineral-in-character;

(3) The millsite claim is not used or occupied by the proprietor of a vein, lode or placer deposit for mining, milling, processing, or beneficiation purposes or other operations in connection with such mines, and is not used or occupied for mining or milling purposes by the owner of a quartz mill or reduction works; and

(4) The claims are not held in good faith for mining purposes.

The Bagwells filed an Answer on November 15, 1989, challenging all of the allegations in the Contest Complaint.

Following a hearing on February 20 and 21, 1990, and the submission of post-hearing briefs by the parties, Judge McKenna issued his Decision on November 8, 1990. He concluded first that the validity of the Dora May millsite claim had already been decided by the United States District Court in United States v. Bagwell, No. CV 88-4944 SVW (C.D. Cal. Apr. 30, 1990), and he would abide by that decision: "[S]ince the District Court has ruled on the validity of the Dora May Millsite claim that issue is settled and no longer before me." (Decision at 10.) He, thus, rejected the Bagwells' contention that only the U.S. Department of the Interior can determine the validity of a mining or millsite claim.

Next, Judge McKenna concluded, after carefully considering all of the evidence, that the Government had established a prima facie case, based on the testimony of the USFS mineral examiner who had examined the claims, her accompanying exhibits, and the lack of production from the claims, that each of the mining claims was not supported by the discovery of a valuable mineral deposit within its boundaries, and that the Bagwells had failed to overcome that case by a preponderance of the evidence. He further held that the Government had carried its burden of demonstrating, by a preponderance of the evidence, that the Bagwells were not holding any of their mining claims in good faith for mining purposes. Judge McKenna, thus, declared the three lode mining claims invalid.

The Bagwells took a timely appeal from Judge McKenna's November 1990 Decision.

In the Statement of Reasons (SOR) for their appeal, Appellants contend first that Judge McKenna erred in deciding to abide by the district court's April 1990 Memorandum of Decision and Judgment in the case of United States v. Bagwell, No. CV 88-4944 SVW (C.D. Cal.), ruling on the validity of the Dora May millsite claim. Rather, they argue that the judge could not rely on the district court's ruling because it had "overstepp[ed] [its] power," since "primary jurisdiction" over the validity of the claim resided in the Department. (SOR at 5, 15.)

This very same contention was rejected by the circuit court in Bagwell, which held that the district court did have jurisdiction to decide the validity of the millsite claim where to do so was "incident or ancillary" to its disposition of the suit by the United States seeking to recover physical possession of the affected Federal lands because they had been occupied by the Bagwells, under that claim, contrary to the Mining Law of 1872. 961 F.2d at 1454. Relying on United States v. Nogueira, 403 F.2d 816, 823-25 (9th Cir. 1968), the circuit court in Bagwell reasoned that the courts are available to afford the United States an "immediate remedy" where mining claimants are illegally occupying the Federal lands. Thus, it is permissible, in order to accomplish the primary aim of the assertion of jurisdiction, i.e., "vindicat[ion of] the United States' possessory interest in public lands," 961 F.2d at 1454, to decide whether a claim is valid. The court therefore held that, in such a situation, the United States "may choose to bring an action in federal court to recover possession of the public land without first adjudicating the validity of the claim in administrative proceedings." Id.

[1] The Board is not empowered to decide whether the district court in United States v. Bagwell, No. CV 88-4944 SVW (C.D. Cal.), had the requisite jurisdiction to issue its April 1990 Memorandum of Decision and Judgment, ruling on the validity of the Dora May millsite claim.

By virtue of the district court's ruling of invalidity, which was ultimately upheld by the circuit court, the Bagwells, who clearly were parties to the judicial proceeding, were thereafter precluded, by the doctrine of res judicata, from relitigating that issue before Judge McKenna and before the Board. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Turner Brothers Inc. v. Office of Surface Mining Reclamation & Enforcement, 102 IBLA 111, 120 (1988). As the Court said in Sunnen:

> [W]hen a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit * * * are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

333 U.S. at 597 (quoting from Cromwell v. County of Sac, 94 U.S. 351, 352 (1876)). We, therefore, will not entertain any issues regarding the validity of the Dora May millsite claim.

[2] At issue in Appellants' next challenge to Judge McKenna's rulings on the validity of their three lode mining claims, 3/ is whether

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3/ In considering whether the mining claims are supported by the discovery of a valuable mineral deposit, we do not rely at all on the opinion by the district court in Bagwell, which decided only whether Appellants were using or occupying the millsite claim in good faith for mining or milling purposes, or attribute any collateral estoppel to findings of fact made by it.

Appellants have discovered a "valuable mineral deposit" on each of their mining claims, such that the claim is valid under 30 U.S.C. § 22 (1994). A deposit will be said to have been discovered when it is shown that minerals exist within the boundaries of a claim in such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313, 322-23 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). It must be demonstrated, as a present fact, that there is a reasonable likelihood that minerals can be extracted, removed, and marketed from the claim at a profit. United States v. Coleman, 390 U.S. 599, 600, 602-03 (1968); United States v. Collord, 128 IBLA 266, 268 (1994), aff'd in part, rev'd in part on other grounds, No. 94-0432-S-BLW (D. Idaho Aug. 27, 1996), appeal filed, No. 96-36179 (9th Cir. Oct. 25, 1996); United States v. Mavros, 122 IBLA 297, 301 (1992). It does not require however that a claimant must be engaged in a profitable mining operation or that commercial success must be assured. United States v. Mavros, 122 IBLA at 301.

When the Government contests a mining claim on the basis that the claimant has not discovered a valuable mineral deposit, it bears the initial burden of establishing a prima facie case of invalidity, as of the date of the hearing. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Mavros, 122 IBLA at 302.

A prima facie case will be deemed to have been established where a Government mineral examiner testifies at the hearing that she has traversed a group of claims, sampling all exposed areas of mineralization identified by the claimant and herself, and, on the basis of that examination, she is of the opinion that no valuable mineral deposit has been discovered on any of the claims. Hallenbeck v. Kleppe, 590 F.2d at 859; United States v. Mavros, 122 IBLA at 306-08.

Once a prima facie case has been established, the burden shifts to the claimant to establish, by a preponderance of the evidence, that a valuable mineral deposit has in fact been discovered within the limits of the claim. Hallenbeck v. Kleppe, 590 F.2d at 856; United States v. Mavros, 122 IBLA at 302.

When the Dora May mining claim was initially examined by Virginia (Ginny) R. Grove, a USFS mineral examiner, in 1982, she found that the

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fn. 3 (continued)
We agree with Judge McKenna that the finding of unprofitability, while undoubtedly supportive of its finding of lack of proper use or occupancy of the associated millsite, see United States v. Bagwell, 961 F.2d at 1456, was not necessary to the court's decision in that regard, and thus will not have a collateral estoppel effect here with respect to the mining claims. (Decision at 10; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).) The Government's arguments to the contrary are rejected. See Government's Response to SOR at 6-8.

underground workings were partly inaccessible. While she was able to access the upper (No. 1) and middle (No. 2) levels for a total distance of 435 feet, access to the lower (No. 3) level was precluded since the portal had caved in. (Tr. I 53; Ex. C-45, at 19.) 4/ She reported the presence of quartz veins in these workings:

> The quartz vein * * * in the underground workings on the Dora May lode mining claim * * * has a maximum continuous exposed strike length of 55 feet and varies in thickness from a maximum of about three feet to a minimum of zero feet. The vein pinches out or is faulted off at the south end and is offset by faulting at the north end * * *. A possible continuation of the vein is exposed in underground workings on level 2 thirty feet southwest along the offsetting fault. The average thickness of this extension is 1.3 feet.

(Ex. C-45, at 17.) When Grove reexamined the mining claim in 1989, she found that two "stopes" in the upper and middle levels had been created or cleared and that the lower level had been made accessible for a distance of about 65 feet. (Tr. I 59; see Tr. II 229; Ex. A-12; Ex. C-23, at 9.) Grove also reported that she found in 1982, on the surface of the claim immediately above the underground workings, "remnants" of a quartz vein around the edges of a "glory hole." (Ex. C-45, at 27.) She also found north of those workings, a quartz vein that was "exposed sporadically" and averaged about 1.5 feet in width, which she was able to "follow[] for about 140 feet." (Ex. C-45, at 17.)

In the case of the other mining claims, Grove found in 1982 an "open cut" 22 feet in length on the surface and an adit that had caved in and was thus of undetermined length on the Little Ruth, and about 10 feet of adit on the Thelma May. (Ex. C-45, at 19.) She reported the presence of quartz veins:

> The quartz veins * * * are similar in appearance and composition to the vein exposed north of the underground working on the Dora May lode mining claim. The vein on the Little Ruth lode mining claim was exposed for a total of 18 feet and averaged one foot thick. The vein on the Thelma May lode mining claim was exposed to a total of 45 feet and averaged 1.6 feet thick. Neither showed signs of mineralization.

(Ex. C-45, at 18.)

Appellants contend first that the judge improperly held that the Government had established a prima facie case that Appellants had not

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4/ This case involved a 2-day hearing. Each day's proceedings was transcribed in a separately paginated document. We will cite to that of the Feb. 20, 1990, hearing as Tr. I, and that of the Feb. 21, 1990, hearing as Tr. II.

discovered a valuable mineral deposit within the boundaries of any of the mining claims. 5/ They assert that the Government's failure to establish a prima facie case resulted because its mineral examiner did not properly sample the claims, failing to sample all along the exposed veins and other areas of mineralization. 6/ (SOR at 8, 9.)

A Government mineral examiner is not required to sample beyond the areas of exposed mineralization, either on the surface or in underground workings, within the limits of a mining claim. As the court stated in Hallenbeck v. Kleppe, 590 F.2d at 859: "[T]he examiner is not required to perform discovery work for the claimant, or to explore or sample beyond those areas which have been exposed by the claimant, as the examiner simply verifies whether a discovery has been made." See United States v. Page, 119 IBLA 12, 23 (1991); United States v. Cook, 71 IBLA 268, 270 (1983); United States v. Arcand, 23 IBLA 226, 229 (1976); United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, 195 (1971). Nor is an examiner required to engage in a comprehensive sampling program in order to establish definitively whether a valuable mineral deposit exists somewhere within a claim. United States v. Mavros, 122 IBLA at 307. Rather, an examiner is only required to traverse a claim, identifying any exposure of mineralization and sampling any site or sites deemed representative of any and all such exposures.

In November 1982, Grove examined all of the mining claims at issue here in the field, taking 17 "channel" or "chip-channel" samples from the exposed quartz veins at locations selected by Mr. Bagwell, 14 from the Dora May (11 from the underground workings and the glory hole and 3 from the surface area), 1 from the Little Ruth, and 2 from the Thelma May. (Tr. I 51-52; Ex. A-9, at 9, 10.) The samples were taken across the width

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5/ Appellants also assert that Judge McKenna abused his discretion by not ruling on all of the proposed findings of fact submitted by them, citing specific findings by the numbers assigned in Appellants' Findings of Fact, dated July 9, 1990, and Additional Findings, dated July 25, 1990. (SOR at 5-6.) However, Appellants make no effort to demonstrate how a ruling on any finding was necessary or even relevant to a resolution of the case, and we cannot discern any such basis. We, thus, find no error. United States v. Wood, 51 IBLA 301, 319-20, 87 I.D. 628, 638-39 (1980).

6/ Appellants argue that the examiner's qualifications to evaluate the "potential worth" of their mineral deposits was directly contradicted by her testimony and that of her supervisor. (SOR at 7.) We reject this assertion. The cited testimony only establishes that Grove had not, in fact, evaluated any lode mining claims in the area of Appellants' claims. See Tr. I 40-41. This did not constitute an admission that she was not qualified to do so. Moreover, the record demonstrates that Grove was well qualified by virtue of her training and experience with the USFS since 1981 to evaluate any mineral deposit found on Appellants' claims. (Tr. I 33-34; Ex. A-10, at 90-16.)

of the vein "at locations showing indications of mineralization (i.e[.], iron staining, etc.)." (Ex. A-9, at 9.) Grove testified at the hearing that she found no other areas of mineralization to sample on any of the three claims. (Tr. I 52-53, 71, 75.)

Appellants contend that they were improperly "limited" to the 17 samples. (SOR at 8.) However, there is no evidence to support this assertion. Rather, the evidence was that Grove permitted Mr. Bagwell to point out any and all sites on the three claims that he believed indicated the discovery of a valuable mineral deposit. (Tr. I 51, 118, 137; Ex. A-9, at 9.) Thus, any "limit[ation]" on the identification of sample sites was not imposed by Grove or any other Government employee. The Appellants have not identified other areas that should have been sampled by Grove nor have they alleged that they were precluded from sampling such areas and submitting the results of assays of those samples. 7/

All of the samples taken in 1982 were fire assayed for gold and silver by Mountain States Mineral Enterprises of Tucson, Arizona. 8/ (Tr. I 55; Ex. A-9, at 9-10.) Assay results for the Dora May mining claim varied widely from 0.001 to 1.162 oz./ton for gold and from undetectable to 0.56 oz./ton for silver. (Ex. A-9, at 15, Attachment No. 3-2.) Grove observed that the underground mineral values were "not evenly distributed":

> Four of the 9 locations sampled (4000-4001, 4002, 4007, and 4009-4010) showed significant gold values (0.462 to 1.162 oz/ton). Two samples (4005 and 4006) showed minor amounts of gold (0.020 - 0.024 oz/ton) and three samples (4003, 4004, and 4008) showed only trace amounts of gold (0.001 - 0.004 oz/ton).
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> Similarly, five samples (4000-4001, 4002, 4006, 4007, and 4009-4010) showed moderate amounts of silver (0.230 to 0.560

7/ There is evidence that Mr. Bagwell had no problem with the Government's sampling program. He testified that, given the extent of his development work at the time of Grove's examinations, the samples were taken from the best areas for disclosing the highest levels of gold or silver. (Tr. I 139-40.)

8/ Eleven of the samples were also assayed, at the request of Mr. Bagwell, for either copper or titanium. (Tr. I 55; Ex. A-9, at 10.) In 1989, 15 of the samples taken were assayed for titanium. (Tr. I 145; Ex. A-10, at 21.) However, according to Grove, the assays disclosed negligible values for these minerals, Tr. I 67, 144-45, and Appellants, while arguing that titanium is available on the claims in quantity, but see Tr. II 167, 291, have made no effort to demonstrate that the quality of the ore would justify its development. See Tr. I 149; SOR at 8. The term "ore" as used herein refers to mineralization generally, and as used is not intended to insinuate the presence of minerals in concentrations that can be worked at a profit.

> oz/ton), while the silver content of the remaining four samples (4003, 4004, 4005, and 4008) was below detection limits (less than 0.01 oz/ton).

(Ex. A-9, at 15-16.) She therefore concluded that "little dependence should be placed on the continuity of the mineralization." (Ex. A-9, at 16.) Assay results for the Little Ruth and Thelma May claims showed trace amounts of gold and either minor or undetectable amounts of silver. (Ex. A-9, at Attachment No. 3-2.)

In June and September 1989, Grove obtained 30 additional chip channel samples from the Dora May mining claim. According to Grove, 15 were taken from sites chosen by Mr. Bagwell, "which he considered would have high values," and 15 from sites selected by Grove, in order to "get a more repre-sentative and balanced picture of the value of the mineral deposits." 9/ (Tr. I 60; see Tr. II 50-51; Ex. A-10, at 13.) Twenty-one of these samples were taken from the area of the two stopes that had been created or cleared since the 1982 examination. Grove estimated that about 20 tons of material had been removed from these areas since that examination. (Tr. I 59-60.)

All of the 1989 samples were fire assayed for gold and silver by Skyline Labs, Inc., of Tucson, Arizona. (Ex. A-10, at "Exhibit C.") Assay results again ranged widely from less than 0.002 to 1.995 oz./ton for gold. Id. In the words of Judge McKenna: "Only one sample had an assay value of over 0.70 ounces of gold per ton. [Of the remaining 29,] [s]even samples had values between 0.2[2] and 0.70 ounces per ton, and the rest were far

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9/ Appellants contend that the assay results of the 1989 samples are "invalid" because they were not submitted to BLM for its verification and approval, as required by "Federal law and procedure," before being offered at the administrative hearing. (SOR at 9, 10.) The samples were admittedly collected and assayed in conjunction with the lawsuit against the Bagwells, and were intended to support that effort. (Tr. II 265; Ex. A-10, at 12-13.) The assay results were admittedly not provided to BLM. (Tr. II 264-65.) However, we find no violation of Federal law and procedure. We know of no Federal statute or regulation that required Grove to submit the results for BLM's verification and approval, especially where they were considered merely supportive of the mineral report already submitted by USFS in support of its request for a Government contest. Moreover, we can discern no prejudice to Appellants. Evidence regarding the taking and assaying of the samples was provided at the hearing, and Grove indicated that she relied on the assay results in formulating her opinion, offered at the hearing, that the Dora May mining claim does not contain a valuable mineral deposit. (Tr. I 60, 62, 63-65, 80-81; Ex. A-10, at 12-13.) In these circumstances, Appellants had every opportunity to challenge the manner of the taking of the samples or otherwise establish that they do not represent the quality of mineral on the claim, to challenge the assay results themselves, or to challenge Grove's opinion based on those results. Thus, they were properly admitted, and may be relied upon.

less than this." (Decision at 5 n.3.) Also, with one exception (sample No. 4081-0.07 oz./ton), all of the samples yielded less than 0.01 oz./ton for silver. (Ex. A-10, at "Exhibit C.")

No additional samples were taken in 1989 from the other two mining claims because Mr. Bagwell, who stated that there had not been further development since the 1982 examination, indicated that "[no] fresh mineralization * * * worthy of being sampled" had been exposed, (Tr. I 73), or did not request sampling, (Ex. A-10, at 13).

At the hearing, Grove summed up her opinion regarding what was disclosed by the 1982 and 1989 examinations of the underground workings of the Dora May mining claim, as follows:

> [T]here have been some anomalies, high value samples, isolated high values.
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> These have mostly been restricted to the areas, the stoped areas, above the upper level and below the middle level, respectively, and one high value sample taken at the glory hole on the surface. This is indicated by the location 4,009, 4,010 on that. That was one of -- that part was a high value.
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> What it amounts to is that there are basically two areas that I've sampled which represent[] small offshoots or isolated pods of mineralization, [of] wh[at] [are] otherwise [] pr[ed]omin[a]ntly barren quartz vein structures, * * * [with] only trace amounts of gold through the rest of the mine.

(Tr. I 63-64; see Tr. I 174.)

In a January 30, 1989, Mineral Report, Grove determined the amount and value of ore reserves on each of the three mining claims, based on her 1982 field examination.

In the case of the Dora May claim, Grove calculated that it contained a total of 135.66 tons of ore in the underground workings (including the glory hole) and 25.50 tons on the surface, based on aggregations of the deposits disclosed by the various samples. 10/ (Ex. A-9, at 20, 21.)

10/ Each sample was deemed to disclose a block of ore having a width of 4 feet, i.e., the width at which the exposed vein would be mined, a depth of 5 feet, and extending, on either side of the sample site, either 5 feet or "half the distance to the nearest sample." (Ex. A-9, at 20; see id. at 19-20, Attachment No. 1.9; United States v. Collord, 128 IBLA at 274 n.10.) Grove based her calculations regarding the amount and value of the deposit disclosed by each sample on an area of influence extending on either side of the sample site, despite the fact that she believed that, absent any continuity of mineralization, the assumption was "probably over[ly]-generous." (Ex. A-9, at 19.)

In computing the value of the underground deposit and deposits on the surface of the Dora May and other mining claims, Grove relied on reported gold and silver prices, as of November 1982, of $407.25/oz. and $10.13/oz. (Ex. A-9, at 22.)

Thus, Grove concluded that the combined reserves, in the case of the Dora May mining claim, totalled 161.16 tons, which were then valued at $9,083.51. (Ex. A-9, at 22.) However, since she expected that only 95 percent of the gold would be recovered, she reduced that total value to $8,629.36. 11/ (Ex. A-9, at 26.)

In the case of the Little Ruth claim, Grove calculated that it contained 30.60 tons, valued at $0.36/ton (based on adjustment of a weighted average value of 0.001 oz./ton for gold and 0.10 oz./ton for silver), or a total value of $10.32, while the Thelma May claim contained 76.50 tons valued at $0.50/ton (based on adjustment of a weighted average value of 0.003 oz./ton for gold and no detectable silver), or a total value of $36.33. (Ex. A-9, at 23-25.) Grove testified that these deposits are negligible. (Tr. I 73, 76.)

Grove concluded in her 1989 Mineral Report that all three claims had a total value of $8,676.01. (Ex. A-9, at 26.)

At the February 1990 hearing, Grove testified that, based on her subsequent field examination of the Dora May mining claim in 1989, she had determined that there were 146 tons of underground ore, valued at that time at $3,180, given prices at the time of the hearing of $418.85/oz. (gold) and $5.29/oz. (silver). 12/ (Tr. I 64, 68-69; Tr. II 19.) She attributed the change in the amount and value of the ore reserves mostly to mining that had occurred since her 1982 examination. (Tr. I 64-65.) For purposes of assessing the economic viability of mining operations, the underground deposit was rounded up to 150 tons, thus resulting in a total value of the deposit of $3,267. There had been no change in the case of the other two mining claims.

11/ The combined value was based on a value for the underground deposit of $8,568.67 and for the surface deposit of $60.69. (Ex. A-9, at 26.)

12/ The 146-ton deposit was reported to have an average value for gold and silver of $21.78/ton, based on an average of 0.052 oz./ton (gold) and 0.012 oz./ton (silver). (Tr. II 19.) Grove admitted that there was evidence of a lower grade deposit disclosed at the lower level of the underground mine, i.e., 408 tons having an average value of $6.63/ton, based on an average of 0.016 oz./ton (gold) and undetectable silver. Id. This deposit would add $2,705.04 to the overall value of the underground deposit, resulting in a total value of $5,884.92. However, it would cost $48,752 to mine the whole 554-ton deposit, given per ton mining costs of $88. See infra.

Grove next determined that, in the case of the Dora May mining claim, it would cost $89.33 in labor costs to mine each ton of underground ore. (Ex. A-9, at 27.) She based this estimation on recent practices by the Bagwells, (Ex. A-9, at 26), as well as the plan of operations that they had submitted for USFS approval in 1984, both of which indicated that the ore would be extracted and removed by hand methods:

> "Th[e] claim will be mined by following the vein by digging adits and shafts. The mined ore will be hauled to the Dora May mill site. The small amount of waste rock will be sidecast at the current tailing site. No new surface disturbance is planned. Any necessary blasting will be contracted to licensed blasters. No storage of explosives is planned. At the most, 1 1/2 tons of ore will be mined per week using pick and shovel."

(Ex. A-9, at 27 (quoting from Ex. A-26 (Plan of Operations, dated July 27, 1984), at "80A-48").) Grove concluded that the labor of one man, working 8 hours a day for 5 days, and being paid $3.25 per hour, could reasonably be expected to yield the 1-1/2 tons of ore each week. (Ex. A-9, at 27.) The cost for mining the entire 135.66-ton underground deposit would thus be $12,119.

At the February 1990 hearing, Grove testified that she had recalculated the mining cost to be $88/ton, thus resulting in a total mining cost of $13,200 for the 150-ton deposit. (Tr. I 77.) At that time, she figured that the labor of two men, working 8 hours each day, and being paid $10 per hour, along with the cost of explosives ($8/ton), could reasonably be expected to yield 1 ton of ore per man each day. 13/ (Tr. I 77-78, 79.) Grove explained that this estimation was based on consulting the literature and other experts regarding "what would be a reasonable rate of production for this sort of small, very small, mining venture." (Tr. I 78.) She also stated that she had increased the hourly labor charge from $3.25 to $10 to reflect Mr. Bagwell's valuation of his own labor. (Tr. I 78.) Grove further noted that the total cost was the "minimum" cost of mining, not taking into account fuel and other charges. (Tr. I 80.)

Because the total cost of mining the 150-ton underground deposit in the case of the Dora May mining claim ($13,200) well exceeded the total value of that deposit, which represented the vast majority of the value on that claim ($3,267), Grove testified that, at the time of the hearing, it could not be mined at a profit, and thus Appellants had not discovered

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13/ We note that Mr. Bagwell stipulated at the hearing to the accuracy of Grove's estimate that two men, whose labor was properly valued at $10/hour, could have each mined 1 ton of ore per day. (Tr. I 121, 122-23; but see Tr. II 203 ("going rate" for union miner underground - $14 to $20/hour); Ex. C-23, at 14 ($75/ton).)

a valuable mineral deposit on the claim. (Tr. I 68-69, 77, 80-81.) She testified to similar effect in the case of the Little Ruth and Thelma May mining claims. (Tr. I 73-74, 77.)

Appellants primarily contend that Grove failed to properly sample the Dora May mining claim, and rest that contention mostly on their assertion that certain exhibits demonstrate that there is a "total of 710 [feet] of exposed vein in place between the surface exposures above the underground adits and the floor of the third level adit." (SOR at 8 (citing Ex. A-12; Ex. C-45, at 17, Attachment No. 1.4).) They argue that, given this exposure, Grove should have obtained, following standard procedure to sample at 5-foot intervals, a total of 142, rather than 44, samples. (SOR at 8.)

The evidence cited by Appellants shows that the surface and underground workings in the case of the Dora May mining claim extend for a total distance of about 701 feet. It does not, however, support the assertion that a vein or group of veins has been "exposed" anywhere near that total distance. Rather, the exposure is, at best, on the order of 225 feet. (Ex. C-45, at 17, 27; Ex. A-12.) We are not persuaded that the sampling undertaken by Grove was not adequate to represent the quality of mineralization in the various exposed veins. She regarded it as adequate, especially given the large number of samples taken. (Tr. I 65; Tr. II 22-23.) In addition, we note that Mr. Bagwell agreed that the sampling was sufficient, given the extent of his workings. When asked by Judge McKenna whether he agreed that "the areas of sample [by Grove] were the best areas which would derive the highest degree of either gold or silver," he replied: "Only as per the amount of development work I've done so far." (Tr. I 139-40.) That is all that was required.

We find no merit to Appellants' objections to the fact that Grove did not take samples at 5-foot intervals along the entire 45-foot length of the "exposed vein" on the Thelma May claim. (SOR at 6.)

While Grove admitted that the vein on the Thelma May claim was probably 40 to 50 long (Tr. I 72), she stated that the samples were taken from sites identified and then exposed by Mr. Bagwell: "It was really not much exposed. It was a little quartz vein, which as I remember I think Mr. Bagwell took a shovel and dug it out to expose it where he wanted me to sample. * * * He showed me the discovery post and also, exposed the two sites of which I sampled, which were close to it." (Tr. I 70-71.) There is no evidence that the vein was exposed at any other location. See, e.g., Ex. A-16. Thus, we are not persuaded that Grove failed to properly sample an area of exposed mineralization.

Next, Appellants argue that the Government's use of channel or chip channel sampling, which involves relatively small samples taken at regular intervals along a vein, is "not a valid means of establishing a prima facie case of in[]validity" in the present case, since the gold values are unevenly distributed. (SOR at 11.) As proof of this, they point to the fact that the values in ounces per ton of gold recovered from their mill exceed the average ounces per ton yielded by Grove's sampling of the upper and middle level stope areas. Id. at 10-11.

However, while the values reported by Appellants (1.06 and 0.91 oz./ton) were higher than the averages obtained by Grove (0.418 and 0.287 oz./ton, Ex. A-13, at 1, 2), they did agree with the value of one sample (No. 119) taken by Grove (1.995 oz./ton, Ex. A-13, at 1). Moreover, absent any evidence regarding exactly where and how the ore milled by Appellants was extracted from the underground mine, we have no way to judge whether or to what extent the gold recovered represents the remaining deposit. United States v. Parker, 82 IBLA 344, 356, 91 I.D. 271, 278 (1984). We thus have no basis for disputing Grove's conclusion that "[b]ulk sampling * * * would not have produced, in my opinion, any more accurate values," or for holding that her sampling was not representative. (Tr. I 62; see Tr. II 256.)

Nonetheless, we do agree with Judge McKenna that bulk sampling, in which relatively large samples are taken at regular intervals along a vein, "would have yielded more accurate results," especially concerning what would be recovered by actual mining operations, which generally result in the extraction of large quantities of targeted ore. (Decision at 6.) This is due to the uneven distribution of the mineral values, as demon-strated by the testimony of Appellants' expert, Tom T. Heywood, an independent mining consultant with over 40 years' experience in the mining industry. (Tr. II 140-44.)

Judge McKenna properly held that a prima facie case may be based on channel or chip channel sampling, (Decision at 6), and we reject the assertion that channel or chip channel samples may not be used to support a prima facie case. United States v. Mavros, 122 IBLA at 308. As we said in United States v. Crowley, 124 IBLA 374, 377 (1992), in responding to the claimants' contention that the Government had failed to establish a prima facie case because it had not, in accord with mining industry standards, bulk sampled:

> This argument indicates a fundamental misconception regarding the nature of the burden that rests on the Government in conducting a mineral examination. A Government mineral examiner is not required to sample all areas of a mining claim in order to determine the full extent of mineralization so that it might be decided whether mining operations would actually be profitable. Nor is the Government responsible for generating the same level of information that would be required by a mining company when deciding whether to go ahead with mining. The duty of a Government mineral examiner is to sample existing exposures of mineralization disclosed on a claim in order to determine whether mining operations are likely to be profitable. See, e.g., United States v. Opperman, 111 IBLA 152, 157 (1989).

To require the Government, in support of its prima facie case, to do more than analyze what it regards as representative samples, taken by the channel or chip channel method, from areas of exposed mineralization would be to improperly require it to effectively engage in mining or at least to undertake discovery work on behalf of the claimants. See Tr. I 62; Tr. II 30; United States v. Cook, 71 IBLA at 270. It is up to the claimants to

rebut that case, which they may do by demonstrating that the sampling is not representative of what is found on their claims, and to show what is actually found there. This they failed to do. Indeed, while Appellants object to the Government's failure to engage in bulk sampling, neither they nor their expert did so. See Tr. II 144-45.

Next, Appellants assert that Judge McKenna's reliance on a November 28, 1989, Declaration (Ex. A-17) of Robert S. Shoemaker, a metallurgical engineer, in finding that the Government had established its prima facie case, constituted a denial of due process of law, since they were not permitted to confront that witness. (SOR at 4, 5, 14.)

At the hearing on February 20, 1990, the Government offered Shoemaker's declaration for admission into evidence as one of 20 exhibits that had already been admitted in the proceeding before Judge Wilson and Appellants initially had no objection. (Tr. I 29-30.) Subsequently, Appellants objected to admission of the Shoemaker declaration, and Judge McKenna advised that he would consider the transcripts of the hearing before Judge Wilson, during which they had exercised their right to cross-examine Shoemaker. (Tr. II 137.) However, after the hearing, the Government notified Judge McKenna and Appellants that it would no longer rely on Exhibit A-17. 14/ (Letter, dated May 21, 1990.)

Despite the withdrawal of Exhibit A-17, we note that Judge McKenna referred to it in his Decision, indicating that it supported the conclusion that the costs of mining and milling the ore from the mining claims would exceed the value that would be derived from doing so, and thus supported the Government's prima facie case that none of the claims contained a valuable mineral deposit. (Decision at 7, 7 n.7.) It is clear, however, that Judge McKenna's determination that the Government had established a prima facie case did not rely on Shoemaker's declaration. Rather, he relied exclusively on the testimony of Grove, and her accompanying exhibits, to the effect that the value of the mineral deposits on the claims did not exceed the costs of mining and the fact that there was little or no production from any of the claims. (Decision at 12-14.) Thus, we find that Judge McKenna did not rely on Shoemaker's declaration to find that the Government had presented a prima facie case, or otherwise deprive Appellants of due process of law by not affording them an opportunity to con-front Shoemaker.

We are satisfied that Judge McKenna properly held that the Government had established a prima facie case that none of Appellants' mining claims

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14/ The Government informs us that it "never withdrew" Shoemaker's declaration as an exhibit and thus Judge McKenna could independently rely on it. (Government's Response to SOR at 5.) We note that the Government specifically said in its May 21, 1990, letter to Judge McKenna that it "hereby withdraws its reliance on" Exhibit A-17. We can only interpret that as a withdrawal of the exhibit itself since it had been introduced for the sole purpose of supporting the Government's prima facie case.

was, at the time of the hearing, supported by the discovery of a valuable mineral deposit. United States v. Mavros, 122 IBLA at 309-10.

Appellants assert that they overcame the Government's prima facie case by a preponderance of the evidence. However, in defense of their position, they focus on the Dora May claim and cite little or no evidence in support of the existence of a valuable mineral deposit on the Little Ruth or the Thelma May claims. See SOR at 16-17. Appellants have made little or no attempt to determine the quality of ore present on any of the three mining claims. See Tr. II 144-45, 304-05. Appellants refer to the assay results of six samples taken by Frederick F. Kerpsie, a State-certified mining technician and local mine operator, during the course of the June 1989 examination of the Dora May claim by Grove, which were assayed at the request of A. Cecil Burton, a local miner with over 40 years of experience in the mining industry. (SOR at 9, 17.) These samples were taken in the immediate vicinity of six samples taken by Grove in the area of the two stopes that had been created or cleared since her 1982 examination. (Tr. I 161-62; Ex. C-70, at 6-7; Ex. C-74, at 2.) However, nowhere does the record identify how the samples were taken, or especially that they were taken in such a way as to accurately reflect the quality of the deposit in the vicinity of the sample. In any event, even assuming that they were properly taken, we agree with Judge McKenna's assessment:

> [T]he results were not materially different from the Forest Service's assays[;] both showed irregular mineralization on the Dora May lode mining claim. Indeed, Mr. Burton stated in an unsigned affidavit provided by contestees that the Bagwells' claims only show "spotty mineralization." Contestees' Exhibit 70 [at 7].

(Decision at 5.) The uneven distribution of gold was supported by Heywood, who stated that, in the case of the quartz veins found on the claims, gold appears to be very closely associated with sulfide accumulations, which are "scattered throughout the quartz very irregularly." (Tr. II 144.) This is also admitted by Appellants. See Ex. C-23, at 12.

Despite the fact that Heywood, Appellants' expert, testified that it was not yet possible to estimate the quantity of ore present on the claims, (Tr. II 154), we note that Mr. Bagwell stated that, in 1980, he estimated that the Dora May mining claim contains 2,000 tons, (Ex. C-23, at 9-10). We agree, however, with Judge McKenna that this estimate is unsubstantiated with proof regarding the length, width, and depth of the vein or veins, and thus is not probative of the quantity of ore present on the claim. (Decision at 8.) Indeed, Mr. Bagwell admitted: "I don't know the quantity, because I am not at the bottom of the vein, nor am I either at the northern extension of the vein or [at] the southern extension of the vein. We're still developing." (Tr. I 125.) Bagwell admittedly had no estimate of reserves for either of the other two mining claims. (Tr. II 303, 305, 306-07.)

Proof of quantity is crucial to establish the existence of a valuable mineral deposit. See United States v. Crowley, 124 IBLA at 385. Isolated

showings of high values of gold will not alone suffice to demonstrate the existence of a valuable mineral deposit. United States v. Parker, 82 IBLA at 368-69, 91 I.D. at 285-86. Nor is it sufficient to simply say that "some * * * high grade [ore] does exist on these claims," or that a "large ore body * * * could be close at hand." (Ex. C-70, at 7; see Tr. I 175 ("[W]e're sitting right on top of it"); Tr. II 303 ("I wouldn't be surprised if we have in excess of 50,000 tons of half ounce [per ton] or better ore on each of the three lode claims").) Rather, there must be evidence that the high values persist for a sufficient distance along the vein that there may be said to be a continuous mineralization, the quantity of which can be reasonably determined by standard geologic means. United States v. Parker, 82 IBLA at 368-69, 91 I.D. at 285-86; United States v. Weekley, 86 IBLA 1, 6 (1985). Appellants have failed to make such a showing. 15/

The whole thrust of Appellants' case is that they are entitled to continue searching for a valuable mineral deposit. This was foreshadowed in their answer to BLM's complaint, wherein, in challenging BLM's contention that they had not discovered such a deposit, Appellants stated: "The evidence will demonstrate that sufficient mineral quality and quantity content exist within the boundaries of the * * * Lode Claims to justify continued development to verify a valid discovery and that this development has been and is presently going forth in good faith." (Answer at 2.) Plainly, at the time they filed their answer on November 15, 1989, Appellants were still looking to find a valuable mineral deposit. See SOR at 17 ("[Appellants' evidence] support[s] their contentions that the Dora May [L]ode Claim is being occupied in good faith mining effort, while seeking a discovery").

When asked on cross-examination whether Appellants had discovered a valuable mineral deposit, Heywood testified that his examination of the claims supported the conclusion that the Bagwells were still "prospect[ing]." (Tr. II 165.) He noted that the claims contained mineralization, but admitted that Appellants had not done enough work to demonstrate that it was available in sufficient quantity to constitute a valuable deposit:

15/ What we regard as most indicative of Appellants' failure to preponderate on the existence of a valuable mineral deposit is the fact that in order to at least cover mining costs of $88/ton they must show that there is a deposit on one or more of their claims having a relatively continuous value of at least 0.20 oz./ton of gold, given a price of $418.85/oz, and 0.80 oz./ton of silver, given a price of $5.29/oz. They have failed to do so. See Tr. II 41-42 (break-even grade for mining and milling costs of $320/ton is 1.09 oz./ton for gold, at 70-percent recovery from mill). We note that Appellants have also failed to meet their own standard. See Tr. II 302 ("[W]e figure that if we process ore and recover less than a half ounce of gold in a ton, that we would not meet the basic expenses necessary").

THE COURT: Do you have any idea about the prospects of gold and silver on those mining claims?

THE WITNESS: I believe there is gold occurring on the claims, yes, sir. I don't know how much, what quantities. I don't think there's any way you can, at this time, that you can reasonably quantify them.

THE COURT: In other words, you don't have sufficient information at this time to determine whether there was a valuable discovery on that site? Is that what you're saying?

THE WITNESS: I don't think -- there isn't sufficient information available. There isn't -- enough work hasn't been done on the claim[s]. They are still in the prospect stage.

THE COURT: All right. Has there been sufficient work to determine whether Mr. Bagwell could mine it and make a profit?

THE WITNESS: No, I don't think so. I think the -- the determination of that could be arrived at within -- certainly within 12 months if there was some progressive work done underground and it was processed in the mill. Then you would be able to arrive fairly quickly at an answer.

(Tr. II 164-65.) This agreed with Grove's analysis. See Tr. I 173-74.

It is well settled that evidence of mineralization which may justify further exploration, but not development of a mine, does not establish the discovery of a valuable mineral deposit. Barton v. Morton, 498 F.2d 288, 291-92 (9th Cir.), cert. denied, 419 U.S. 1021 (1974); Thomas v. Morton, 408 F. Supp. 1361, 1375 (D. Ariz. 1976), aff'd, 552 F.2d 871 (9th Cir. 1977). As we said, in similar circumstances, in United States v. Parker, 82 IBLA at 358, 91 I.D. at 279: "[T]he values were too erratic and the veins too discontinuous to commence [development] operations without further exploration. [However,] [a] valuable mineral deposit has not been discovered because a search for such deposit might be indicated."

We find no merit to Appellants objections based on Judge McKenna's decision not to review the transcripts of the 2-day hearing before U.S. District Judge Wilson, in United States v. Bagwell, No. CV 88-4944 SVW (C.D. Cal.). (SOR at 5, 13.) The Government did not request transcription of the hearing before Judge Wilson and withdrew the two exhibits. Nothing precluded Appellants from ordering the transcripts and introducing them, but they did not. We find no error in Judge McKenna's failure to require the Government to produce the transcripts, or in his Decision not to review them.

Contrary to Appellants' assertions, there is absolutely no evidence that Judge McKenna required the hearing to be concluded within 2 days or

precluded Appellants from introducing the testimony of any witnesses or exhibits. See, e.g., Tr. I 169-72, 174, 177; Tr. II 154, 266, 298, 304.

We conclude that Judge McKenna properly held that Appellants failed to overcome, by a preponderance of the evidence, the Government's prima facie case of the lack of a discovery of a valuable mineral deposit within the boundaries of each of the three lode mining claims, and thus properly declared them invalid.

To the extent Appellants have raised arguments not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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Gail M. Frazier
Administrative Judge

I concur:

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David L. Hughes
Administrative Judge